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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15 WESTERN DIVISION

16  
17 IN RE  
18 NJOY, INC. CONSUMER CLASS  
19 ACTION LITIGATION

Case No. CV 14-00428-JFW (JEMx)  
consolidated with SACV 14-00427-  
MMM (RZx)

HONORABLE JOHN F. WALTER

**NJOY'S RESPONSE TO  
PLAINTIFFS' OBJECTION TO THE  
DECLARATION OF DENISE  
MARTIN**

Date: February 1, 2016  
Time: 10:00 a.m.  
Place: Courtroom 16

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NJOY'S RESPONSE TO PLAINTIFFS' OBJECTION TO THE DECLARATION OF DENISE MARTIN

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## 1. INTRODUCTION

NJOY has proffered Dr. Denise Martin as a rebuttal expert to independently analyze and evaluate the Bayesian hedonic regression proposed by Plaintiffs' expert witness, Dr. Jeffrey Harris. Plaintiffs' "Objection" to the Declaration of Denise Martin fails in several respects. First, Plaintiffs' objection is really a motion to strike, and Plaintiffs failed to comply with Local Rule 7-3, among others. Second, despite Plaintiffs' misleading attempt to distort Dr. Martin's qualifications, a review of Dr. Martin's education, training, and experience over the past 25 years demonstrates that she is vastly qualified to opine on Dr. Harris's proposed Bayesian hedonic regression. For this reason alone, the bulk of Plaintiffs' objection fails. Third, Plaintiffs fail to show that any portion of Dr. Martin's opinions, assumptions, or recitations of generally accepted principles are incorrect in any manner. Fourth, Plaintiffs' objection mischaracterizes Dr. Martin's reliance on the opinions of Dr. Van Liere, and the applicable standards relating to one expert's reliance on another expert for assumptions. Most glaringly, Plaintiffs ignore Dr. Martin's opinion that Dr. Harris's proposed Bayesian hedonic regression cannot properly estimate damages in this case, independent of Dr. Van Liere's testimony. Lastly, Plaintiffs impermissibly attempt to shift the burden for rebuttal experts.

**2. PLAINTIFFS' OBJECTION/MOTION TO STRIKE SHOULD BE OVERRULED/STRICKEN BECAUSE PLAINTIFFS FAILED TO COMPLY WITH LOCAL RULE 7-3**

Local Rule 7-3 requires that “counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.” “The purpose of Local Rule 7-3 is to eliminate, or narrow the scope of, the motion and avoid unnecessary expense of the Court’s time and resources.” *Attalla v. Equinox Holdings, Inc.*, 2015 U.S. Dist. LEXIS 70018, at \*2 (C.D. Cal. May 29, 2015) (citing *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002)). “A district

1 court has the discretion to strike a motion that fails to comply with the local rules.”

2 *Id.*

3 There can be no dispute that Plaintiffs failed to meet and confer with NJOY’s  
4 counsel before filing their objection/motion to strike. On Friday, December 18,  
5 2015, the same day that Plaintiffs filed their objections/motions to strike, Plaintiffs’  
6 counsel indicated by email that they intended to file “objections” to the declarations  
7 of NJOY’s expert, Denise Martin. (Declaration of Paul L. Gale in Support of  
8 NJOY’s Response to Plaintiffs’ Objections to the Declarations of Kent Van Liere  
9 and Denise Martin (“Gale Decl.”), ¶ 2, Ex. A.) This was the first time that  
10 Plaintiffs had stated they would be filing an objection or motion to strike Dr.  
11 Martin’s declaration. Moreover, Plaintiffs’ correspondence did not relate to any  
12 meet and confer, or request a meet and confer, but instead merely asked whether  
13 NJOY believed particular deposition citations were confidential. In fact, Plaintiffs  
14 had no intention of meeting and conferring, as the correspondence was sent to the  
15 two NJOY attorneys who were attending an out of town deposition in this case on  
16 the same day. Those same attorneys had been in another deposition in this case two  
17 days earlier as well, and Plaintiffs never requested any meet and confer, or provided  
18 any indication that they would be filing a motion to strike against NJOY’s experts.  
19 (*Id.* at ¶ 2.)

20 Later that same day, but before anything was filed, NJOY’s counsel  
21 responded to Plaintiffs’ counsel’s question as follows:

22 Can you please let me know what you mean by “objection.” To  
23 the extent Plaintiffs are seeking to exclude Dr. Martin, or the  
24 opinions of Dr. Martin, any such “objection” is effectively a  
25 motion to strike/Daubert motion. Pursuant to Local Rule 7-3,  
26 Plaintiffs were required to meet and confer prior to the bringing the  
27 motion. Plaintiffs have never conducted such a conference, and  
28 the time to conduct such a conference passed last week. Moreover,

1 Plaintiffs insisted that NJOY conduct such a meeting prior to  
2 bringing its motion to strike Dr. Harris.

3 (*Id.*, Ex. B.) Plaintiffs ignored NJOY's email and filed their objection/motion to  
4 strike without conferring with NJOY's counsel. (*Id.* at ¶ 3.) As a result, the  
5 required Local Rule 7-3 conference of counsel never took place. (*Id.*)

6 Further, Plaintiffs cannot be permitted to avoid the Local Rules by styling a  
7 motion to strike as an "objection." Plaintiffs' "objection" is a *Daubert*  
8 motion/motion to strike, regardless of the title affixed to it. In fact, the first  
9 paragraph of the objection/motion to strike contains a recitation of the *Daubert*  
10 standard, and the remainder of the objection/motion to strike focuses on Dr.  
11 Martin's alleged failure to meet that standard. Notably, Plaintiffs recently asserted  
12 that Local Rule 7-3 does indeed apply to *Daubert* motions, and insisted that NJOY  
13 conduct a lengthy Local Rule 7-3 conference prior to filing its motion to strike the  
14 opinions of Plaintiffs' expert, Dr. Jeffrey Harris. (*Id.*, Ex. C.)

15 Plaintiffs' objection/motion to strike is also procedurally improper, because  
16 Plaintiffs failed to include a notice of motion, which among other items, requires a  
17 concise statement of the relief or Court action the Plaintiffs seek and a statement  
18 that the motion was brought following the conference of counsel pursuant to Local  
19 Rule 7-3. L.R. 6-1, 7-3, 7-4.

20 The Local Rules exist for a reason. Because Plaintiffs' counsel failed to meet  
21 their obligations required by the Local Rules before filing their objection/motion to  
22 strike, the objection/motion to strike should be stricken. See *Attalla*, 2015 U.S.  
23 Dist. LEXIS 70018, at \*2 (striking a motion because counsel failed to comply with  
24 Local Rule 7-3); *ABS Entm't, Inc. v. Cumulus Media, Inc.*, 2015 U.S. Dist. LEXIS  
25 164551, at \*2-3 (C.D. Cal. Nov. 25, 2015) (striking motion for class certification  
26 for failure to comply with Local Rule 7-3).

1       **3. DR. MARTIN IS AN EXPERT ON BAYESIAN HEDONIC**  
2       **REGRESSION AND HEDONIC REGRESSION ANALYSIS**

3       Dr. Martin is well qualified to provide opinions regarding hedonic regression  
4       analysis and what Dr. Harris describes as a “Bayesian hedonic regression.” Dr.  
5       Martin is well-versed in each aspect of a Bayesian hedonic regression, as well as  
6       the model as a whole. Hedonic regression and “Bayesian hedonic regression” are a  
7       subset of general regression analysis and rely on the same statistical techniques.  
8       (Declaration of Dr. Denise Martin in Response to Plaintiffs’ Objections to the  
9       Martin Declaration (“Martin Responsive Decl.”), ¶ 8.) As explained in more detail  
10      in the Martin Responsive Decl., regression analysis is a statistical tool that  
11      estimates the relationship between a dependent (or explained) variable and one or  
12      more independent (or explanatory) variables. (*Id.* at ¶ 9.) In other words,  
13      regression analysis is a statistical tool that helps to explain what effect, if any,  
14      certain independent variables (for example, the amount of time spent studying)  
15      have on an outcome (such as grades) that is the dependent variable. (*Id.*)

16       Hedonic regression is simply a form of such regression analysis that uses  
17      price as the dependent variable that is attempting to be explained. However, instead  
18      of using hours spent studying to explain grades, product attributes are used as  
19      independent variables in an attempt to explain price. (*Id.* at ¶ 10.) As explained in  
20      more detail in Section 4 hrerein, hedonic regression can only be applied under strict  
21      conditions where the market is stable and a company has no control over price –  
22      conditions that are not present here.

23       As proposed in this context, the term “Bayesian” refers to a statistical model  
24      in which the information considered in the regression analysis is supplemented with  
25      some form of outside (or “prior”) information. That outside information can come  
26      from a variety of sources. Dr. Harris proposes to use the results from a proposed  
27      conjoint survey as the outside information for his hedonic regression, and he thus  
28      coins his method as a “Bayesian hedonic regression.” (*Id.* at ¶ 11.)

1 Dr. Martin earned a Ph.D. in Economics from Harvard University in 1991.  
2 Dr. Martin was trained in regression analysis, including hedonic regression, as well  
3 as in Bayesian methods, during her undergraduate education at Wellesley College  
4 and her graduate education at Harvard University.<sup>1</sup> (*Id.* at ¶ 12.)

5 Dr. Martin joined NERA Economic Consulting in 1991, and has been a  
6 Senior Vice President at NERA since 2001. Since joining NERA, Dr. Martin has  
7 used regression analysis in hundreds of projects on which she was retained.  
8 Moreover, during that time, Dr. Martin has run regressions that incorporate  
9 information from outside the regression data, which are considered to be  
10 “Bayesian” regressions. (*Id.* at ¶ 13.) Accordingly, it is clear that Dr. Martin is  
11 well qualified to opine on hedonic regression analysis and Bayesian hedonic  
12 classes.

13 The dubious nature of Plaintiffs’ argument as to why Dr. Martin is not  
14 qualified is made clear by the several nonsensical and irrelevant arguments  
15 Plaintiffs make regarding Dr. Martin’s experience. For example, Plaintiffs argue  
16

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17 <sup>1</sup> While Plaintiffs attack Dr. Martin for her testimony that she did not take  
18 any courses devoted solely to hedonic regression or Bayesian hedonic regression,  
19 no such classes appear to exist. (Martin Responsive Decl., ¶ 12, n.19; *see also*,  
20 Gale Decl., Ex. H (listing courses taught at Harvard, which does not include any  
21 stand alone classes for hedonic regression or “Bayesian hedonic regression”).)  
Because these methods are subsets, or applications, of broader regression analysis,  
22 and because hedonic regression is only appropriate under a set of very stringent  
23 conditions, the absence of entire courses devoted exclusively to these topics is not  
24 at all surprising. Moreover, Plaintiffs failed to put in any evidence that their expert,  
25 Dr. Harris, took such stand-alone classes, or that it is necessary to have taken such  
hypothetical stand-alone classes. Similarly, Plaintiffs also attack Dr. Martin for not  
26 knowing if there is a definitive text for Bayesian regression, even though they never  
27 established that such a text even exists, or that the contents of the hypothetical text  
somehow contradicts her opinions. In fact, Plaintiffs’ own expert, Dr. Harris, did  
not testify regarding any definitive texts on the subject in either his declaration or  
his deposition.

1 that because Dr. Martin's work has been focused more in the areas of "securities  
2 litigation, product liability and mass torts valuation and labor economics," she lacks  
3 expertise in consumer fraud matters and is somehow unqualified to opine in this  
4 matter. (Objection to the Declaration of Expert Denise Martin ("Obj."), 4:7-22).  
5 Whether Dr. Martin is, or is not, an expert in "consumer fraud cases" is irrelevant to  
6 whether she is qualified to opine on Dr. Harris' proposed regression damages  
7 models. In any event, many of the cases in which Dr. Martin has been retained  
8 involve consumer fraud issues. (Martin Responsive Decl., ¶ 14.) In addition, while  
9 Plaintiffs rely on NERA's website for their assertion that Dr. Martin has "focused  
10 her work at NERA in three areas: securities litigation, product liability and mass  
11 tort valuation, and labor economics," Plaintiffs fail to inform the Court that  
12 NERA's website classifies "Class Actions and Class Certification" as a practice  
13 consisting of antitrust, labor and employment, product liability, and securities, with  
14 consumer class actions dealing with fraud and misrepresentation included as a subset  
15 of product liability. Consumer class actions are considered a "focus area" for the  
16 practice, and Dr. Martin is the designated practice chair at NERA for the class  
17 action practice as a whole, as well as the focus area. (*Id.*)

18 Even more preposterous is Plaintiffs' reliance on the fact that Dr. Martin has  
19 mostly been retained by defendants in litigation. Whether Dr. Martin is retained by  
20 plaintiffs or defendants is wholly unrelated to whether she is qualified to provide  
21 her opinions in this matter. Plaintiffs' position is also highly inappropriate given  
22 that their expert, Dr. Harris, has only opined on behalf of plaintiffs during his  
23 career. (*See* June 3, 2015 Deposition of Jeffrey Harris at 57:16-18, attached as Ex.  
24 F to the Gale Decl.)

25 Plaintiffs also argue that Dr. Martin is not qualified because she estimated  
26 that she has spent 10% of her time at NERA on consumer class actions. (Obj.,  
27 4:16-17.) For the reasons set forth above, this argument is irrelevant to whether she  
28 is qualified to opine on Dr. Harris's proposed regression models. Further,

1 Plaintiffs' argument lacks merit for several additional reasons. First, Dr. Martin's  
2 education, including her graduate level studies in regression analysis, statistics,  
3 Bayesian methods, and hedonic regression, give her a basis to render the opinions  
4 regarding why Dr. Harris's proposed Bayesian hedonic regression is not  
5 appropriate. Second, Dr. Martin's career spans nearly 25 years, so 10% of such a  
6 long career gives her substantial practical expertise in such cases. (Martin  
7 Responsive Decl., ¶ 15(a).) Dr. Martin's experience includes, among other things,  
8 two reports in consumer class action matters in which plaintiffs' expert proposed  
9 using hedonic regression. (*Id.* at ¶ 15(b).)

10 Finally, Dr. Martin has served as a consulting and testifying expert in more  
11 than 100 other class action matters (including securities class actions and  
12 employment class actions), which has provided her with tremendous practical  
13 experience in addressing economic questions similar to those present in this case.  
14 While the contexts for these matters may have differed, the assignment in each of  
15 those cases often has been the same: to estimate damages, if possible, using the  
16 difference between the price paid and the price that would have been paid absent  
17 certain alleged wrongdoing. For example, in dozens of securities class actions, Dr.  
18 Martin has performed regression analyses to estimate the price investors would  
19 have paid for a security absent any alleged misstatements or omissions by a  
20 defendant, controlling for market and industry factors, which required that she first  
21 analyze whether the market conditions existed for her to apply the regression  
22 analysis.<sup>2</sup> (*Id.* at ¶ 15(c).)

23

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24 <sup>2</sup> See, e.g., "Affidavit, in *Marvin Neil Silver and Cliff Cohen vs. IMAX*  
25 *Corporation, et al.*, Ontario Superior Court of Justice, 2012"; "Rebuttal Report and  
Declaration, in the United States District Court, District of Puerto Rico, in *Samuel*  
26 *Hildenbrand, et al. vs. W Holding Company, Inc., et al.*, 2012"; "Deposition and  
Reports in the United States District Court, District of New Jersey, *In Re: Schering-*  
27 *Plough Corporation/ENHANCE Securities Litigation*, 2011"; and "Deposition and  
Reports in the United States District Court, District of New Jersey, *In Re: Merck &*

1       **4. PLAINTIFFS HAVE FAILED TO SHOW THAT ANY ASPECT OF**  
2       **DR. MARTIN'S DECLARATION IS ERRONEOUS OR**  
3       **UNRELIABLE**

4       Plaintiffs' objection/motion to strike suffers from another glaring defect –  
5       Plaintiffs failed to provide any evidence to show that the opinions and generally  
6       accepted principles Dr. Martin sets forth in her declaration are incorrect. Dr.  
7       Martin has testified regarding generally accepted principals for hedonic regression,  
8       and made clear that it is generally accepted that use of hedonic regression is only  
9       appropriate when certain quite stringent conditions apply.

10      In particular, to be able to interpret the coefficients on the product attributes  
11     as implicit prices for those attributes, and to further conclude that the price of the  
12     product without the attribute would be the actual price less the estimated implicit  
13     price for the attribute, the analyst must have reason to assume that market is stable  
14     and that both firms (sellers) and consumers are “price takers.” Firms and  
15     consumers that are price takers believe that they do not have control over price and  
16     must accept the price as set by the market. That is, firms are able to sell their  
17     product at the established market price, but would be unable to do so if they raised  
18     price and have no incentive to lower price. Price-taking consumers similarly are  
19     able to buy products at the established market price, but do not have sufficient  
20     purchasing power in the market to be able to pay less for a product than the market  
21     price. (Martin Responsive Decl., ¶ 10 n.17). If the market is not sufficiently stable  
22     or mature (e.g., if the product in question was introduced recently, so that firms are  
23     still entering and exiting and new product variations are still being introduced),  
24     market-clearing prices will be in flux so that hedonic regression cannot reliably  
25     measure the implicit price associated with any particular product attribute. (*Id.*)

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27      *Co., Inc., Vytorin/Zetia Securities Litigation, 2011,” all of which are included in*  
28      *Exhibit 1 to Martin Responsive Decl.*

1 Dr. Harris acknowledges this point in his Reply Declaration. (Harris Reply Decl.,  
2 Dkt. 168, ¶ 33.) If these conditions do not hold, which they do not for the e-  
3 cigarette market, then the link between the price of the product and the implicit  
4 prices of the underlying product attributes is severed and hedonic regression will  
5 fail and be unable to be used to measure any implicit equilibrium price of the  
6 attribute. The same market conditions must hold for Bayesian hedonic regression  
7 to be applied as they are for standard hedonic regression. (*Id.* at ¶ 10.)

8 Plaintiffs do not put forward any evidence, and do not dispute, these  
9 generally accepted principles. Clearly, if Dr. Martin was incorrect regarding these  
10 requirements, Plaintiffs could have cited to *some* authority on that point. Instead,  
11 Plaintiffs fail to point to anything in Dr. Martin's declaration or testimony that is  
12 incorrect, and Plaintiffs fail to put forward any evidence to rebut any of Dr.  
13 Martin's opinions or her discussion of general accepted principles.

14 **5. HEDONIC REGRESSION AND BAYESIAN HEDONIC  
15 REGRESSION ARE SELDOM, IF EVER, USED IN CLASS ACTION  
16 LITIGATION BECAUSE OF THEIR STRICT REQUIREMENTS**

17 Plaintiffs also attack Dr. Martin for not having rebutted or conducted a  
18 Bayesian hedonic regression for litigation.<sup>3</sup> Significantly, a Lexis search for a  
19 proposed damages model labeled as Bayesian hedonic regression, in all cases, state  
20 and federal, yields zero results. (Gale Decl., ¶ 9.)<sup>4</sup> Moreover, Plaintiffs have not

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21 <sup>3</sup> Dr. Martin's experience does include submitting two reports in consumer  
22 class action matters in which plaintiffs' expert proposed using hedonic regression.  
23 (Responsive Martin Decl., ¶ 15(b).) Moreover, "[w]here a witness has considerable  
24 expertise working in a specific field, the witness's 'lack of particularized  
25 experience' in one aspect of that field, 'goes to the weight accorded her testimony,  
26 not to the admissibility of her opinion as an expert.'" *Chelan County Washington  
v. Bank of Am. Corp.*, 2015 U.S. Dist. LEXIS 89414, at \*21 (E.D. Wa. July 9,  
2015) (quoting *United States v. Garcia*, 7 F.3d 885, 889 (9th Cir. 1993)).

27 <sup>4</sup> The application of hedonic models (whether classical or Bayesian) occurs  
28 most often in the study of the real estate market, because the housing supply in the

1 shown their expert, Dr. Harris, has ever submitted or conducted a Bayesian hedonic  
2 regression for litigation previously.

3 **6. DR. MARTIN IS NOT PROVIDING ANY OPINIONS REGARDING**  
4 **THE DESIGN OR IMPLEMENTATION OF CONJOINT ANALYSIS**  
5 **OR THE DIRECT METHOD, AND DOES NOT NEED TO BE AN**  
6 **EXPERT IN THOSE SURVEY METHODS TO RENDER HER**  
7 **OPINIONS REGARDING BAYESIAN HEDONIC REGRESSION**

8 Plaintiffs assert that Dr. Martin is not an expert with respect to conjoint  
9 analysis or the direct method. However, Plaintiffs' objection should be disregarded  
10 because it is a strawman, as Dr. Martin is not opining on the design or  
11 implementation of conjoint analysis or the direct method. As Dr. Martin makes  
12 clear in her declaration, she "was asked to evaluate whether the Bayesian hedonic  
13 regression analysis proposed by Dr. Harris could be used in this matter to estimate  
14 the difference between the price paid by NJOY consumers and the price they would  
15 have paid absent the alleged misstatements and omissions regard the safety of  
16 NJOY e-cigarettes." (Declaration of Denise Martin ("First Martin Decl."), Dkt.  
17 263, ¶ 2, excerpts of which are attached as Ex. I to the Gale Decl.) As discussed in  
18 Section 3 above, Dr. Martin is unquestionably qualified regarding regression  
19 analysis and Bayesian methods to provide her opinions of whether the Bayesian  
20 hedonic regression analysis Dr. Harris proposes could be used to measure damages  
21 in this matter.

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22 short-run can be considered fixed and because individual homeowners act as price  
23 takers who do not typically believe they can affect the equilibrium prices of houses  
24 in the market. (Martin Responsive Decl., ¶ 11, n.21.) At a very macro level, the  
25 damages model approved in *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919 (C.D.  
26 Cal. 2015) ("Conagra II") could be considered to be a form of a Bayesian hedonic  
27 regression, because it brings outside information into a hedonic regression.  
28 However, as discussed in NJOY's Motion to Strike the Supplemental Declaration  
of Jeffrey E. Harris (Dkt. 255-1) (Gale Decl., Ex. J), the model proposed in  
*ConAgra II* is markedly different in many respects.

1       To reiterate, a Bayesian hedonic regression uses outside information about  
2 the value of an attribute in the regression, and that outside information could come  
3 from a variety of sources. In order to evaluate whether the Bayesian hedonic  
4 regression is applicable, Dr. Martin does not need to be an expert in how that  
5 particular data was obtained. This is why Dr. Martin opines that Dr. Harris's  
6 proposed Bayesian hedonic model will not work, even if Dr. Harris's conjoint  
7 analysis could be performed and would be reliable. Moreover, Dr. Martin does not  
8 need to be an expert in the outside data source (*i.e.*, the conjoint survey) to opine that  
9 the information from that data source cannot be properly incorporated into the  
10 regression analysis. For example, Dr. Martin opines that Dr. Harris's proposal to  
11 use a conjoint survey as outside information for the regression is problematic here,  
12 because a hedonic regression looks at the marginal consumer, while a conjoint  
13 study looks at the average consumer. (Gale Decl., Ex. I, First Martin Decl., Dkt.  
14 263, ¶¶ 33-38.)

15       Dr. Martin is not opining on whether a conjoint study looks at the average  
16 consumer, and instead, is relying on Dr. Van Liere's opinion (as well as the fact  
17 that it is a generally accepted principle in that field), for her assumption that the  
18 source of the outside information being incorporated into the regression is for the  
19 average consumer. If that assumption, which is undisputed, is correct, Dr. Martin's  
20 expertise in regression analysis provides her with a sufficient basis to opine that the  
21 use of such data is problematic. (*See* Section 7.2, *infra*, for a further discussion  
22 regarding the propriety of Dr. Martin relying on Dr. Van Liere.)

23       In total, Dr. Martin relies on Dr. Van Liere for three assumptions, all of  
24 which are undisputed. The first assumption is that a conjoint analysis analyzes the  
25 average consumer. The second assumption is that the valuations derived from a  
26 conjoint analysis will be contemporaneous (whereas historical purchase prices are a  
27 key input into a Bayesian hedonic regression). (First Martin Decl., ¶ 5(a).) The  
28 third assumption is that the information derived from Dr. Harris's proposed model

1 is unreliable (and unreliable data cannot be used to remedy the issues present in a  
2 Bayesian hedonic regression). (*Id.*, ¶ 5(c).)

3 Ironically, if Plaintiffs' position were correct – that Dr. Martin could not  
4 testify regarding Bayesian hedonic regression because she is not an expert in  
5 conjoint analysis – then Dr. Harris similarly would have to be excluded for that  
6 reason alone, because he has admitted that he is not a survey expert and would be  
7 relying on others to design and implement the conjoint survey.

8 **7. DR. MARTIN DOES NOT IMPERMISSIBLY RELY ON THE  
9 OPINIONS OF DR. KENT VAN LIERE**

10 Plaintiffs assert that Dr. Martin cannot offer an opinion on how contingent  
11 valuation fits into Dr. Harris's proposed Bayesian hedonic regression analysis,  
12 because Dr. Martin impermissibly relies on the expert report of Dr. Kent Van Liere  
13 for that opinion. (Obj., 5:21-23.) This argument fails for three reasons. First, Dr.  
14 Martin's opinion that Bayesian hedonic regression cannot generate an estimate of  
15 damages in this case is *independent* of Dr. Van Liere's testimony, a fact that  
16 Plaintiffs fail to address or acknowledge. Second, Dr. Martin is simply relying on  
17 Dr. Van Liere's opinions regarding conjoint analysis as an input into her more  
18 complete analysis – she is not, as Plaintiffs suggest, simply parroting Dr. Van  
19 Liere's opinion, or holding out the opinions regarding conjoint analysis as her own.  
20 Third, the cases on which Plaintiffs rely in support of their assertion that  
21 "piggybacking" is impermissible, are factually distinguishable from Dr. Martin's  
22 conduct, and are simply inapplicable.

23 **7.1 Dr. Martin's Opinion That Bayesian Hedonic Regression Cannot  
24 Generate an Estimate of Damages in This Case Is Independent of  
25 Dr. Van Liere's Testimony**

26 Plaintiffs' Objection makes no reference to Dr. Martin's conclusion that Dr.  
27 Harris's Bayesian hedonic regression will not and cannot generate an estimate of  
28 damages as defined by this Court (*i.e.*, the difference between the price paid and the

1 price that would have been paid absent the alleged misstatements and omissions).  
2 (Martin Responsive Decl., ¶ 19.) That conclusion is completely independent of Dr.  
3 Van Liere’s opinions and testimony, rendering false Plaintiffs’ assertion that “most  
4 of Martin’s opinions are, in fact, based on Van Liere’s conclusions.” (Obj., 9:22-  
5 24.) Dr. Martin reaches this conclusion for two reasons. First, because of the  
6 immature and unstable market conditions, Dr. Harris’s method cannot yield a price  
7 premium for any attribute, including the alleged “safety claim,” a point that Dr.  
8 Harris admits. (Reply Declaration of Dr. Jeffrey Harris in Support of Plaintiffs’  
9 Motion for Class Certification (“Harris Reply Decl.”), Dkt. 149-1, ¶¶ 29, 33,  
10 excerpts of which are attached as Ex. K to the Gale Decl.) Even in his declaration  
11 filed in support of Plaintiffs’ amended motion for class certification (Dkt. 249-1),  
12 Dr. Harris does not claim that he could use the results from conjoint analysis or  
13 direct survey to address this fundamental problem. Second, as Dr. Harris  
14 acknowledged in his deposition, Bayesian hedonic regression is not designed to  
15 generate a “but for” price where market conditions would change. (Harris October  
16 26, 2015 deposition (“Harris Second Dep.”) at 131:9-16 and attached as Ex. E to  
17 Gale Decl.; *see also*, Harris Reply Decl., Dkt. 149-1, ¶¶ 29, 33.) Accordingly, there  
18 is no basis for Plaintiffs’ assertion that Dr. Martin’s opinion should be stricken  
19 because she impermissibly relies on the opinions of Dr. Van Liere. (Martin  
20 Responsive Decl., ¶ 19.)

21      **7.2 Dr. Martin Uses Dr. Van Liere's Opinion to Highlight the Failures**  
22            **of Dr. Harris's Proposed Regression Analysis**

23        While Dr. Martin relies on Dr. Van Liere's opinions for issues relating to the  
24 design and implementation of conjoint surveys, Dr. Martin is not reiterating those  
25 opinions as her own. Further, Plaintiffs mischaracterize and overstate Dr. Martin's  
26 reliance regarding those limited issues.

First, while Dr. Martin is not offering an opinion regarding Dr. Harris's  
conjoint analysis and direct surveys, she has knowledge and experience regarding

1 those techniques and knows exactly how they are used in a Bayesian hedonic  
2 regression. (Martin Responsive Decl., ¶ 24.)

3 Second, Dr. Martin relies on Dr. Van Liere only to highlight the unreliability  
4 of the conjoint analysis and direct survey methods, and the effect of that  
5 unreliability on Dr. Harris's proposed regression. Dr. Harris conceded that the  
6 hedonic regression analysis he proposes "may suffer from important limitations,"  
7 including collinearity, omitted variable bias, and misspecification. (Supplemental  
8 Declaration of Jeffrey E. Harris in Support of Plaintiffs' Motion for Class  
9 Certification ("Harris Supp. Decl."), Dkt. 249-1, ¶¶ 20-37, excerpts of which are  
10 attached as Ex. L to the Gale Decl.)<sup>5</sup> Dr. Harris claims that using the results of his  
11 proposed conjoint analysis and direct survey as an input or "priors" to his hedonic  
12 regression will allow him to mitigate the limitations he identified. (Gale Decl, Ex.  
13 L, Harris Supp. Decl., Dkt. 249-1, at ¶¶ 33-36; Gale Decl, Ex. E, Harris Second  
14 Dep. at 26:5-27:10.) Dr. Martin relies on Dr. Van Liere for the generally accepted  
15 principles applicable to such surveys and to show the unreliability of the proposed  
16 outside information (gleaned from the conjoint analysis and direct survey), which  
17 she then uses to show additional reasons why Dr. Harris's proposed regression  
18 analysis fails. (Martin Responsive Decl., ¶ 5.) In particular, Dr. Martin concludes  
19 that Dr. Harris will be unable to resolve problems of collinearity in his hedonic  
20 regression, because he will have no way to tether his conjoint results back to his  
21 regression. Dr. Martin also concludes that Dr. Harris will be unable to resolve the  
22 problems of collinearity, omitted variable bias, and misclassification in his hedonic  
23 regression by bringing in unreliable estimates of the associated variables from a  
24 conjoint analysis or direct survey. (*Id.* at ¶ 18.)

25  
26 \_\_\_\_\_  
27 <sup>5</sup> As discussed in NJOY's Motion to Strike Dr. Harris's Supplemental  
28 Declaration, Dr. Harris previously testified that a hedonic regression could not be performed with regard to e-cigarettes. (See Dkt. 255-1 at Section 4.2, excerpts of which are attached as Ex. J to the Gale Decl.)

1        It is customary for experts to rely on the opinions of other experts in  
2 formulating expert testimony and opinions. Every time an expert cites to an  
3 accepted treatise, that expert is explicitly relying on the work or conclusions  
4 reached by someone else. (*Id.* at ¶ 17.) Indeed, Dr. Harris's opinion is replete with  
5 citations to the work and conclusions of others. Here, Dr. Martin is relying on  
6 Dr. Van Liere – who has an M.A. and Ph.D. in Sociology and has been qualified as  
7 an expert on conjoint analysis and direct surveys many times – with respect to  
8 certain flaws in Dr. Harris's proposed conjoint analysis. (*Id.*)

9        Further, contrary to Plaintiffs' assertions, Dr. Martin is not reiterating Dr.  
10 Van Liere's report. Instead, she is relying on Dr. Van Liere's conclusion that Dr.  
11 Harris's conjoint survey is flawed as one part of her analysis of Dr. Harris's  
12 proposed Bayesian hedonic regression. In other words, she is using Dr. Van Liere's  
13 conclusions and then building on them to reach her own, independent  
14 conclusions. That reliance is permissible and does not render her report  
15 inadmissible. *See In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales*  
16 *Practices & Prods. Liab. Litig.*, 978 F. Supp. 2d 1053, 1078-79, 1082 (C.D. Cal.  
17 2013) (holding that one expert may rely on the opinions of another admissible  
18 expert to build on her testimony). Further, to the extent there are any questions  
19 regarding the validity of Dr. Martin's reliance, those questions go to the weight of  
20 her testimony, not its admissibility. *See Hynix Semiconductor Inc. v. Rambus Inc.*,  
21 2008 U.S. Dist. LEXIS 123822, at \*47 (N.D. Cal. Jan. 5, 2008) (holding that  
22 argument regarding the viability of assumptions based on another expert's report go  
23 to weight, not admissibility); *see also Toyota*, 978 F. Supp. 2d at 1072 n.20 ("Any  
24 assumptions made by [the expert] may be challenged in cross-examination, as they  
25 affect weight, not admissibility.").

1           Accordingly, there is nothing impermissible about Dr. Martin's reliance on  
2 Dr. Van Liere's conclusions here.<sup>6</sup>

3           **7.3 The Cases on Which Plaintiffs Rely Are Factually Distinguishable**

4           Finally, the cases on which Plaintiffs rely in support of their assertion that  
5 "piggybacking" is impermissible are factually distinguishable from the present case  
6 involving Dr. Martin. Each of those cases deals with an expert who is attempting to  
7 put forward the opinion of a non-testifying expert as his or her own opinion, or  
8 where an expert relies on inadmissible opinions. See *In re ConAgra Foods, Inc.*, 90  
9 F. Supp. 3d at 950 (finding the proffered expert's testimony regarding what various  
10 surveys meant was inadmissible, because the expert relied on surveys conducted by  
11 other experts not before the court); *J.B. Hunt Transp., Inc., v. General Motors*  
12 *Corp.*, 243 F.3d 441, 444 (8th Cir. 2001) (finding the proffered expert's testimony  
13 inadmissible because its relevance solely depended on the inadmissible testimony  
14 of another testifying expert); *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d  
15 609, 615 (7th Cir. 2002) (concluding that the sole testifying expert's testimony  
16 "would have rested on air" without the testimony of other experts relied upon in the

17  
18           <sup>6</sup> Furthermore, one expert's reliance on another does not render that expert's  
19 testimony inadmissible. Instead, "[e]xpert opinions may find a basis in part 'on  
20 what a different expert believes on the basis of expert knowledge not possessed by  
21 the first expert.' Indeed, this is common in technical fields." *Toyota*, 978 F. Supp.  
22 2d at 1066 (quoting *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613  
23 (7th Cir. 2002)). "For example, a physician may rely for a diagnosis on an x-ray  
24 taken by a radiologist, even though the physician is not an expert in  
25 radiology." *Id.* The *Toyota* court admitted the testimony of several experts whose  
26 opinions were based, in part, on other experts' reports. See *Toyota*, 978 F. Supp. 2d  
27 at 1082 (finding that, because one expert's testimony on a point was admissible, a  
28 second expert may rely on that testimony "to the extent his opinions build on [the  
first expert's] testimony"); *id.* at 1078-79 (same). The court in *Hynix* reached a  
similar conclusion. There, the court held that an expert may properly rely on  
assumptions that are based on other expert reports, and arguments regarding the  
viability of those assumptions go to the weight of the testimony, not its  
validity. 2008 U.S. Dist. LEXIS 123822, at \*46-47.

1 expert's report. Since those other experts were not before the court, the court  
2 excluded the testimony); *In re TMI Litig.*, 193 F.3d 613, 716 (3d. Cir. 1999)  
3 (affirming the district court's exclusion of an expert's testimony that heavily  
4 depended on the inadmissible conclusions of other testifying experts); *Paramount*  
5 *Media Group, Inc. v. Vill. of Bellwood*, 308 F.R.D. 162, 165 (N.D. Ill. 2015)  
6 (excluding the testimony of Plaintiff's expert because he simply collected numbers  
7 from various sources, handed them off to a non-testifying expert to conduct various  
8 calculations, and then presented the conclusions as his own). That is simply not the  
9 case here, as Dr. Martin does not attempt to parrot the opinions of any non-  
10 testifying experts, and does not hold out the opinions of any other experts as her  
11 own.

12 In reality, these cases apply to Plaintiffs' expert, Dr. Harris, who is actually  
13 doing the exact thing Plaintiffs wrongly accuse NJOY's experts of doing. For  
14 example, Dr. Harris, who admits he is not a survey expert, opines on survey  
15 methodology and survey design based on his understanding from other non-  
16 testifying experts who are not before the Court. (Gale Decl., Harris Second Dep.,  
17 32:8-22.) NJOY and the Court are unable to examine those experts' credentials,  
18 unable to analyze their purported opinions, and unable to question them. On the  
19 other hand, NJOY has proffered two experts to opine on fields in which each is an  
20 expert (survey methodology for Dr. Van Liere, and Bayesian and hedonic  
21 regression analyses for Dr. Martin). Each is only opining in his or her field of  
22 expertise. Moreover, both of NJOY's experts have submitted extensive  
23 declarations and both have been deposed.

24 **8. NEITHER NJOY NOR DR. MARTIN BEAR THE BURDEN TO SET  
25 FORTH EVIDENCE REBUTTING DR. HARRIS'S OPINIONS**

26 Plaintiffs object to the opinions expressed in the Martin Declaration because  
27 they "lack foundation" and "are not based on any supporting data or facts." (Obj.,  
28 12:3-5.) Plaintiffs then assert that Dr. Martin's conclusions lack "a single piece of

1 supporting evidence” (Obj., 12:6-7). These arguments demonstrate Plaintiffs’  
2 misapprehension of the burden for rebuttal experts and misstates the record. Dr.  
3 Harris was offered by Plaintiffs as their expert to attempt to satisfy Plaintiffs’  
4 burden on their amended motion for class certification. By contrast, NJOY proffers  
5 Dr. Martin solely as a *rebuttal* expert, and “[t]he function of rebuttal testimony is to  
6 explain, repel, counteract or disprove evidence of the adverse party.” *Clear-View  
Techs., Inc. v. Rasnick*, 2015 U.S. Dist. LEXIS 72601, at \*4 (N.D. Cal. June 3,  
7 2015) (citation omitted). As a rebuttal expert, Dr. Martin is not required to put  
8 forth evidence to affirmatively disprove each of Dr. Harris’s opinions. *Id.* at \*5  
9 (“Although a defendant need not put forth expert opinions to challenge affirmative  
10 theories on which the plaintiff bears the burden of proof, such as damages, a  
11 defendant’s rebuttal expert is limited to offering opinions rebutting and refuting the  
12 theories set forth by plaintiff’s expert(s).”). Here, Dr. Martin is not required to  
13 affirmatively disprove Dr. Harris’s unsupported conclusions; instead, as a rebuttal  
14 expert, Dr. Martin’s sole job is to identify the fundamental flaws in Dr. Harris’s  
15 opinions, which she has done.

16  
17 Furthermore, NJOY responds to each of the enumerated conclusions in  
18 Section IV of the Objection as follows:

19       1. As set forth in great detail in Section 3 herein, Dr. Martin is eminently  
20 qualified as an expert in Bayesian hedonic regression analysis and hedonic  
21 regression analysis. Accordingly, her opinion that Bayesian hedonic regression  
22 analysis “is not designed to provide an estimate of how supply or demand would  
23 change in response to changes in the composition of product attributes available in  
24 the market” is supported and appropriate. Moreover, in support of her opinion, Dr.  
25 Martin referenced: coursework taken at Wellesley and Harvard that included  
26 hedonic regression and Bayesian methods; Dr. Martin’s own work at NERA with  
27 regression analysis, including Bayesian regression, wage regressions, and stock  
28 price regressions; the seminal article on hedonic regression, authored by Sherwin

1 Rosen in 1974, which has been cited in thousands of articles since; an accepted  
2 textbook on econometric methods that includes a detailed review of hedonic  
3 regression; a chapter on Bayesian methods written by Dr. Kenneth Train, adjunct  
4 professor at U.C. Berkeley; and the testimony of Plaintiffs' expert, Dr. Harris, who  
5 agrees Bayesian hedonic analysis is not a tool that can estimate how demand and  
6 supply would have changed absent the alleged misstatements and omissions and  
7 that his approach will not yield a "but-for" price. (Martin Responsive Decl., ¶ 21.)

8       2. Again, for the same reasons discussed in the preceding paragraph, Dr.  
9 Martin is qualified to state that hedonic regression fails because it cannot account  
10 for supply and demand decisions, and provides references to support her opinions.<sup>7</sup>  
11 Moreover, pursuant to the standard for rebuttal experts set forth in *Clear View*, Dr.  
12 Martin is not required to affirmatively disprove Dr. Harris's opinions; instead, she  
13 is identifying material flaws. Further, as Dr. Martin noted, this point is conceded  
14 by Plaintiffs' own expert, Dr. Harris. Lastly, Plaintiffs' argument that an article  
15 relied on by their own expert from 1974, is clearly improper (and illogical).

16       3. The credibility of the percipient witnesses on which Dr. Martin relies  
17 is purely a question regarding the weight of Dr. Martin's testimony; it has nothing  
18 to do with her qualifications and whether she meets the standard set forth in  
19 *Daubert*. Further, Plaintiffs have not put forward any evidence to demonstrate that  
20 the witnesses were "interested," or that the only information in the record on these  
21 issues is incorrect. In addition, Dr. Martin only relied on certain facts provided by  
22 the witnesses' testimony as an input to her analysis, and not as the sole basis for her  
23 conclusions. (*Id.* at ¶ 22.) Dr. Harris acknowledges that his conjoint analysis and  
24 direct survey will yield, at best, current estimates of the willingness to pay for the  
25 alleged "safety claim," and the only testimony in the record is that the market was  
26

27       

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<sup>7</sup> While Plaintiffs cite to Paragraph 10 from Dr. Martin's declaration, the  
28 quoted phrase is not found in that paragraph.

1 changing over the alleged class period as there was entry and exit of manufacturers,  
2 changes in product attributes, and changes in the mix of information available in the  
3 market regarding e-cigarettes. There is no requirement that Dr. Martin conduct  
4 independent research to confirm facts in the record. Lastly, it is common practice  
5 for experts to rely on facts or assumptions when providing their expert opinions.

6       4. Again, pursuant to the standard set forth in *Clear View* for rebuttal  
7 experts, Dr. Martin is not required to put forth evidence disproving Dr. Harris's  
8 opinions. Instead, she has simply identified – based on her extensive experience – a  
9 flaw that will preclude Dr. Harris from constructing his proposed damages model.  
10 Even though nothing more is required, Dr. Martin cited to prior litigation where  
11 experts were unable to obtain such data, and Dr. Martin testified that NERA  
12 reached out to the organizations at issue in an attempt to get the required data, but  
13 were rebuffed, because those organizations do not provide data for litigation  
14 purposes. Lastly, it is Dr. Martin's opinion that even if Dr. Harris is able to obtain  
15 data from an outside agency, such new information will not yield historical data for  
16 Dr. Harris's proposed conjoint analysis – thus making his proposed model  
17 unreliable. (*Id.* at ¶ 23.)

18       5. As discussed in Section 3, Dr. Martin is well qualified to provide her  
19 opinions that Dr. Harris's proposed Bayesian hedonic model will not yield the  
20 proper method of damages, is unreliable, and cannot be performed under generally  
21 accepted principles. As an expert in regression analysis, Dr. Martin is qualified to  
22 opine that one cannot use outside information from a source dealing with average  
23 consumers to a regression that is using a dataset for marginal consumers, and that  
24 the results of a conjoint analysis cannot be tethered to market price via inclusion in  
25 hedonic regression.

26       **9. CONCLUSION**

27       For the reasons set forth herein, Plaintiffs Objection/Motion to Strike should  
28 be overruled/denied.

1 Dated: January 8, 2016

Respectfully submitted,

2 TROUTMAN SANDERS LLP

3

4 By: /s/ Paul L. Gale  
5 Paul L. Gale

6 Attorneys for Defendants  
7 NJOY, Inc. and SOTERRA, INC.

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